

Misselling: A working model

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By P M Nienaber, Ombudsman for Long-term Insurance

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“Misselling” is not a word one would find in a dictionary, neither a conventional nor a legal one.

It is industry slang for “*bad advice*” furnished by or on behalf of an insurer to a policyholder, particularly within the sphere of investment policies. Mere advice given as an opinion followed by a recommendation is free, like speech, and non-actionable in law, even if bad. Not so when the advice is furnished by a professional adviser dispensing financial and investment advice, as anyone whose path has ever crossed *Durr v Absa Bank Limited and another* 1997 (3) SA 448 (SCA) will be quick to testify.

Professional investment advice is almost always furnished in terms of a mandate. A conceptual distinction should in this regard be drawn between misrepresentation, on the one hand, and misselling, on the other.

Misrepresentation consists of a false statement of fact (as opposed to the mere expression of an opinion). It would be a misrepresentation when professional advisers, in soliciting mandates to give advice, should profess to possess, when they in fact lacked, the requisite qualifications, knowledge,

expertise and experience to furnish the kind of advice sought by their prospective customers.

Such a misrepresentation would entitle the customer upon discovery of the falsity of the statement to cancel the mandate and, if the circumstances are favourable, to claim such damages as can be relocated to the misrepresentation.

Misselling, on the other hand, relates not to misstatements inducing the mandate to furnish the advice, but to the actual advice furnished in terms thereof. It will invariably be a term, express or implied, of the customer's mandate to the adviser that such advice should be honest and appropriate. Whereas misrepresentation in the sense used above is pre-contractual and relates to the qualities of the prospective adviser, misselling is post-contractual and relates to the quality of the actual advice.

Post-mandate misselling may, and often will, consist of a commendation to venture into a new investment product or to change or discontinue an existing one, giving rise to the remedies discussed in the penultimate paragraph below. The advice may also embrace a false statement of fact about the recommended product. In such a case a misrepresentation is entwined in the misselling, giving rise to the additional option of rescission and perhaps damages.

Misnomer it may be, but misselling is a harsh reality. During 2004 our office dealt with 706 cases broadly categorised as misselling. This constituted 15% of the totality of cases finalised during the year. In 42% of the cases a determination was wholly or partially made in favour of the complainant.

How does our office approach misselling complaints? By the very nature of our jurisdiction we consider only complaints against subscribing members and their agents, to the exclusion of complaints involving independent intermediaries.

A complicating factor in matters where we do have jurisdiction is that almost invariably there is a dispute of fact as to exactly what transpired between the complainant and his adviser. We resolve such disputes of fact, whenever possible, on a balance of probabilities and with due regard to the onus. In some cases, where the issue is a narrow one and all the protagonists agree to such a course of action, we conduct a hearing, an informal mini-trial, in terms of our Rule 5.3. And sometimes, even when the disputes of fact cannot be resolved in this manner, we are able to circumvent them by accepting the insurer's version of what was said and by focusing exclusively on the single issue: Was the advice appropriate?

The appropriateness or inappropriateness of advice, sanitised from surrounding disputes of fact, is to be assessed:

* with hindsight. The hindsight must, however, be directed at the time, the circumstances and the mindsets which prevailed when the advice was given.

Subsequent events, which might have had an influence on the state of the investment, one way or the other, are to be disregarded;

* objectively. The standard to be applied is that of an imaginary adviser endowed with the qualities reasonably to be expected from someone active in that particular branch of the profession;

* in the light of the terms of the mandate given to the adviser;

* in the light of the evidence adduced, the submissions made and its own sense of what would have been appropriate in the circumstances; and

* taking into account the detriment suffered by the complainant as a result of the inappropriate advice. If no harm is done, well and good. Poor advice at the point of sale which, as it happens, turned out to be good advice at the point of maturity, requires no redress.

To assist the office in the evaluation of misseling complaints we adopt a pragmatic three-step approach in respect of matters in which we enjoy jurisdiction. This is epitomised by the following checklist:

Was the advice inappropriate and misguided?

Factors to be taken into account in this respect are:

* the terms of the mandate;

* whether the advice was inspired by reprehensible motives on the part of the adviser e.g. principally to earn a larger commission. Conversely, the fact that the advice was genuine and well-meant cannot save it if, objectively viewed, it was bad;

- * the personal circumstances of the complainant (age, income stream, future financial requirements, etc);
- * whether a needs analysis and a risk profile had been done in respect of the complainant;
- * whether the complainant's capital was disproportionately committed to the investment;
- * whether the advice was based on:
 - insufficient or incorrect factual information;
 - inadequate research;
 - unreasonable and unrealistic expectations;
- * whether any extraneous or ancillary promises were made to the complainant inducing the complainant to follow the advice.

Was the complainant duly and properly informed when the investment decision was made?

A complainant who was duly and timeously informed of the risks inherent in the proposed investment and yet made the decision to pursue it, should not complain if the investment should subsequently curdle. Such a complainant was not deceived; the bad advice was not the true cause of his loss; and the complainant knowingly and voluntarily assumed the attendant and appreciated risk.

Factors to be taken into account in this regard are:

- * the age and mental condition of the complainant at the time the advice was furnished;
- * whether the risks pertaining to the consequences of the complainant's decision were properly explained to and understood by the complainant, e.g. that capital is at risk and that no guarantee is given;
- * whether realistic alternative options were discussed and explained;
- * whether the complainant had sufficient time and opportunity to reflect on the advice and to obtain advice from other sources;
- * whether it was the adviser who approached the complainant or whether the complainant solicited the advice of the adviser;
- * whether the complainant was assisted by knowledgeable family members or other advisers;
- * whether the complainant obtained independent advice from other outside sources.

Other considerations to be taken into account:

- * Whether there were extraneous factors inducing the complainant to accept the advice, such as:
 - tax or estate duty considerations;
 - the complainant's insistence on following his or her own "hunch";
 - the complainant's dismissal of any warnings about the risks involved.

- * Any documentation signed by the complainant at the time, if such documentation should be contradictory of the complainant's allegation that he or she was duped into accepting the advice.
- * The delay from the time the true state of affairs was discovered until the complaint was raised.
- * The explanation for any such delay.

The remedy

Once the conclusion is reached that the advice was indeed inappropriate and that the complainant was not duly and properly informed of the risks inherent therein, this office, in the exercise of its equitable jurisdiction, would aim to place the complainant in the position he or she would have been in, in monetary or other terms, if the advice had been appropriate. This is a computation or conversion the insurer is itself invariably invited to make, after which it is debated with the parties.

The complainant's own negligence, for instance, in not withdrawing from the bad investment at the earliest reasonable opportunity, have to be taken into account in the delicate balancing act of finding the fairest and most expedient solution to the contretemps between the parties. This, after all is said and done, is the very *raison d'être* for any Ombudsman.